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No. 06-1382

# In the Supreme Court of the United States

RITA J. MCCONVILLE, PETITIONER

*v.*

SECURITIES AND EXCHANGE COMMISSION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether petitioner, who was extensively involved in preparing her company's Form 10-K filing as chief financial officer before being demoted, can be liable for making a false or misleading statement in violation of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. 240.10b-5.

2. Whether the court of appeals otherwise correctly denied a petition for review of the Securities and Exchange Commission's cease-and-desist order, which found that petitioner had violated various provisions of the federal securities laws (and had caused her company to violate others).

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-21a) is reported at 465 F.3d 780. The opinion of the Securities and Exchange Commission (Pet. App. 23a-67a) is reported at 85 SEC Docket 3127.

### JURISDICTION

The judgment of the court of appeals was entered on October 11, 2006. A petition for rehearing was denied on January 17, 2007 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on April 17, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

After the Securities and Exchange Commission (SEC or Commission) instituted administrative proceedings, an administrative law judge found that petitioner

had violated Sections 10(b) and 13(b)(5) of the Securities Exchange Act of 1934 (1934 Act), 15 U.S.C. 78j(b), 78m(b)(5), and Rules 10b-5, 13b2-1, and 13b2-2 thereunder, 17 C.F.R. 240.10b-5, 240.13b2-1, 240.13b2-2, and had caused Akorn, Inc. (Akorn), to violate Section 13(a) and (b)(2) of the 1934 Act, 15 U.S.C. 78m(a) and (b)(2), and Rules 12b-20 and 13a-1 thereunder, 17 C.F.R. 240.12b-20, 240.13a-1. The SEC agreed with the administrative judge's findings and issued a cease-and-desist order. Pet. App. 23a-67a. The court of appeals denied a petition for review. *Id.* at 3a-21a.

1. In 1997, petitioner was appointed chief financial officer of Akorn, a pharmaceutical manufacturer. In the years that followed, Akorn's billing system fell into disarray; the company used two parallel billing systems and failed to charge interest on overdue bills. On February 25, 2000, Akorn's auditor, Deloitte & Touche (Deloitte), sent a letter to the company's board, informing them of difficulties in bill collection. Members of the board subsequently expressed concern that bills were remaining uncollected for long periods. In a response partially drafted by petitioner, Akorn's management pledged significantly to resolve those difficulties by June 30 and to achieve "complete cleanup" by August 31. Pet. App. 5a-6a, 26a-31a.

Later in 2000, Akorn's chairman of the board instructed petitioner and Akorn's chief executive officer to meet with Cardinal Health (Cardinal), Akorn's largest customer, concerning a billing discrepancy of nearly $5 million. That meeting took place in February 2001; at the meeting, petitioner presented Cardinal with only the largest outstanding invoices. After the meeting, Cardinal sent Akorn $913,000 in full satisfaction of its outstanding bills; even after that payment, however, Akorn

contended that Cardinal still owed it more than $5 million. Despite the ongoing dispute, petitioner assured Deloitte that the billing discrepancies were being reconciled and that Akorn's customers owed a relatively small amount in bills that were past due. Petitioner also prepared a press release, dated February 20, 2001, announcing that Akorn's earnings were approximately $2 million in 2000. Pet. App. 6a-7a, 16a, 31a-33a, 37a.

Matters came to a head in March 2001, when an outside consultant submitted a report to Akorn's board of directors disclosing the scale of the collection problem. In the report, the consultant concluded that "[t]he wholesaler accounts have never been worked"; that problems with those accounts had "accumulat[ed] * * * over a 3 or 4 year period"; and that "a determination on the collectibility [of those accounts] will require a substantial amount of time (months) and work." In the wake of that report, the board demoted petitioner to the position of corporate controller and asked her to work with the new chief financial officer to resolve the billing dispute with Cardinal. The board also demoted the company's chief executive officer. Pet. App. 7a-9a, 33a-36a.

As chief financial officer, petitioner had primary responsibility for Akorn's financial statements. She oversaw the drafting of those statements, reviewed them, and presented them to the board, and was jointly responsible for filing the company's financial documents with the SEC. In particular, petitioner "oversaw the drafting of [Akorn's] 2000 Form 10-K" (an SEC filing that includes a company's financial statements). Pet. App. 45a. By the date of her demotion, Akorn's 2000 Form 10-K was largely complete. Thus, while petitioner was still chief financial officer, she reviewed a draft of the Form 10-K that was almost identical to the final ver-

sion and that "incorporated the fourth-quarter and year-end results that she included in the February 20, 2001 press release that she authored." *Ibid.*; see *id.* at 9a-10a, 26a, 36a-38a; C.A. App. 557.

In addition, even after petitioner was demoted, she affirmed the accuracy of Akorn's financial statements to its auditor. On April 17, 2001—the day Akorn filed its Form 10-K—petitioner signed two letters as Akorn's corporate controller. The first letter, which was dated February 23, 2001, stated that the financial statements were prepared in accordance with generally accepted accounting principles and that the credit allowances in the statements were adequate to absorb currently estimated uncollectible accounts; the second letter, which was dated April 17, stated that there were no events after February 23 that would have a material effect on the financial statements. Pet. App. 10a-11a, 38a, 45a-46a.

In its Form 10-K, Akorn reported net income of approximately $2.2 million for 2000, the same figure included in the February 20 press release prepared by petitioner as chief financial officer. The Form 10-K did not disclose the difficulties that Akorn was having in collecting its outstanding bills. In a subsequent quarterly filing, Akorn increased its credit allowance for doubtful accounts from $800,000 to $8.3 million. On October 7, 2002, Akorn filed a Form 10-K/A, which restated its financial statements for 2000 and 2001. In that filing, Akorn reported that it had actually sustained a net loss of $2.4 million in 2000 as a result of its originally undisclosed difficulties in collecting its outstanding bills. Pet. App. 11a, 37a-38a, 40a-41a.

2. On November 12, 2003, the SEC issued an order instituting proceedings, charging petitioner with violat-

ing Sections 10(b) and 13(b)(5) of the 1934 Act and Rules 10b-5, 13b2-1, and 13b2-2 thereunder and causing Akorn to violate Section 13(a) and (b)(2) of the 1934 Act and Rules 12b-20 and 13a-1 thereunder. The administrative law judge found that petitioner had violated or caused Akorn to violate all of those provisions. 83 SEC Docket 2694.

3. On appeal, the Commission agreed with the administrative law judge's findings and issued a cease-and-desist order. Pet. App. 23a-67a. As is relevant here, the Commission found that Akorn's 2000 Form 10-K "overstated Akorn's accounts receivable and current assets because its allowance for doubtful accounts did not include any amounts for Akorn's five largest wholesale customers," *id.* at 42a; that "[t]he statement * * * that the financial statements were prepared in accordance with [Generally Accepted Accounting Principles] was also materially false and misleading," *id.* at 43a; and that "the failure to disclose that the receivables were impaired was an omission of a material fact necessary to ensure that the figures in the financial statements were not misleading." *Id.* at 45a.

The Commission determined that petitioner was liable for the misstatements in Akorn's 2000 Form 10-K under Section 10(b) and Rule 10b-5 because petitioner "oversaw the drafting of the 2000 Form 10-K[] and reviewed a draft of the Form 10-K that was virtually identical to the 2000 Form 10-K that Akorn filed with the Commission" and that "incorporated the fourth-quarter and year-ended results that she included in the February 20, 2001 press release that she authored." Pet. App. 45a. The Commission also determined that petitioner was liable for either violating or causing Akorn to violate various reporting and recordkeeping requirements in

the 1934 Act (and in rules thereunder) because, as chief financial officer, she failed to implement an adequate system of internal controls, and also made misrepresentations to Akorn's auditor. *Id.* at 51a-58a.[1]

Finally, the Commission rejected petitioner's contention that her due process rights were violated because the administrative judge relied on evidence that was outside the scope of the order instituting proceedings. Pet. App. 59a-60a. The Commission concluded that the order instituting proceedings gave respondent "fair notice of the claims lodged and the grounds upon which those claims rest." *Id.* at 60a.[2]

4. The court of appeals denied petitioner's petition for review of the Commission's order. Pet. App. 3a-21a. With regard to the finding of liability under Section 10(b) and Rule 10b-5, the court of appeals rejected petitioner's contention that "she cannot be primarily liable for the misstatements in Akorn's [Form] 10-K," notwithstanding "her significant participation in creating the corporate misstatements," because "she did not sign or physically file the Form 10-K." *Id.* at 13a. Citing its earlier decision in *SEC* v. *Holschuh*, 694 F.2d 130 (7th

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[1] With regard to the violation of Rule 13b2-2, which applies to corporate officers, the Commission rejected petitioner's contention that she could not be liable for her statements in the April 17 letters because she was merely controller, not chief financial officer, at the time of those statements. Pet. App. 57a. The Commission reasoned that "[petitioner's] responsibilities, insofar as they related to the signing of the * * * letters, were commensurate with those of an officer." *Id.* at 57a-58a.

[2] The Commission also rejected petitioner's contention that it lacked jurisdiction under Section 21C of the 1934 Act, 15 U.S.C.78u-3, to enter a cease-and-desist order against her without also joining Akorn in the order, reasoning that it "ha[d] never construed Section 21C as having such a requirement." Pet. App. 66a n.69.

Cir. 1982), the court reasoned that it had "long ago rejected [petitioner's] literal interpretation" of Rule 10b-5. Pet. App. 13a-14a. The court then concluded that there was substantial evidence supporting the other elements of liability under Rule 10b-5. *Id.* at 14a-17a. The court further concluded that there was substantial evidence supporting the Commission's findings of liability under Section 13(a), (b)(2), and (b)(5) and Rules 12b-20, 13a-1, 13b2-1, and 13b2-2. *Id.* at 17a n.16, 18a-21a.

## ARGUMENT

Petitioner contends (Pet. 9-17) that the court of appeals erred by holding that she could be liable under Section 10(b) and Rule 10b-5 on the basis of her extensive involvement in preparing her company's false or misleading Form 10-K filing. Petitioner further contends (Pet. 17-28) that the court of appeals erred in various other respects by denying her petition for review of the SEC's cease-and-desist order. The court of appeals' decision is correct and does not conflict with any decision of this Court or of another court of appeals. Further review is therefore unwarranted.

1. a. Petitioner first contends (Pet. 9-17) that the court of appeals erred by holding that a company executive can be liable under Section 10(b) and Rule 10b-5 for a misstatement in the company's SEC filing where the executive "did not sign, file, or disseminate" that filing. Pet. 13. That contention lacks merit.

The court of appeals correctly held that petitioner could be liable under Section 10(b) and Rule 10b-5 on the basis of her extensive involvement in preparing Akorn's Form 10-K filing. Rule 10b-5(b) provides that it is unlawful for any person directly or indirectly "[t]o make any untrue statement of a material fact or to omit

to state a material fact necessary in order to make the statements made * * * not misleading." 17 C.F.R. 240.10b-5(b). In *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), this Court held that a private party may not pursue a Section 10(b) action on a theory of aiding and abetting liability. *Id.* at 191. In so holding, however, the Court reiterated that "[a]ny person or entity * * * who employs a manipulative device or *makes a material misstatement (or omission)* on which a purchaser or seller of securities relies may be liable as a primary violator under 10b-5, assuming *all* of the requirements for primary liability under Rule 10b-5 are met." *Ibid.* (first emphasis added). The Court did not elaborate on the circumstances under which a party could be said to "make[ ]" a misstatement, although it did note that multiple parties could be liable for a single fraudulent act. *Ibid.* In this case, the court of appeals merely held that, as a corporate executive who had "substantial involvement in drafting" Akorn's Form 10-K and "drafted and reviewed the core financial statements that overestimated Akorn's profits," petitioner could be said to have directly or indirectly "ma[d]e[ ]" that statement for purposes of Rule 10b-5(b). Pet. App. 13a, 15a; see *id.* at 16a (concluding that there was "substantial evidence * * * that [petitioner] made a false statement or omission").[3]

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[3] As petitioner notes (Pet. 7, 11-12), at one point in its opinion, the court of appeals did state that "the issue is not whether [petitioner] (quite literally) delivered the misleading statements to the SEC, but whether she *caused Akorn* to make material misstatements to the investing public." Pet. App. 15a (emphasis added). In so stating, however, the court of appeals was merely recognizing that the misrepresentations at issue in this case were made in a document filed *on behalf of* another party (*i.e.*, Akorn). Indeed, immediately after the

Petitioner cites no case in which a court of appeals has held that a corporate executive cannot be found to have "ma[de]" a misstatement under Rule 10b-5(b) unless the executive personally "sign[ed], file[d], or disseminate[d]" the misstatement at issue. Pet. 13. Instead, petitioner contends that the court of appeals' decision conflicts with the decisions of four other circuits, which, according to petitioner, stand for the more general proposition that "substantial participation with someone who makes a false or misleading statement [does not] violate[] Rule 10b-5." Pet. 11. At most, however, those decisions hold that secondary actors (such as accounting firms or law firms) cannot be liable unless they themselves "make" misstatements; they do not establish when, if at all, such secondary actors can be said to have "made" misstatements issued by companies that they advise. See *Fidel* v. *Farley*, 392 F.3d 220, 235 (6th Cir. 2004) (holding that accounting firm could not be liable because it "did not make a material misstatement or omission"); *Shapiro* v. *Cantor*, 123 F.3d 717, 720 (2d Cir. 1997) (stating that accountants "must themselves make a false or misleading statement (or omission) that they know or should know will reach potential investors" in order to be liable) (citation omitted); *Anixter* v. *Home-Stake Prod. Co.*, 77 F.3d 1215, 1226 (10th Cir. 1996) (same). Indeed, in one of those decisions, the court approvingly cited the same Seventh Circuit decision on which the court of appeals relied here for the proposition that "[t]here is no requirement that the [defendant] *directly* communicate misrepresentations to

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statement quoted by petitioner, the court emphasized that petitioner "drafted and reviewed the core financial statements that overestimated Akorn's profits" and "reviewed and approved a draft of the Form 10-K that consisted of the inaccurate core financial statements." *Ibid.*

[investors]"—thereby confirming that there is no conflict between that decision and the decision below. *Ibid.* (citing *SEC* v. *Holschuh*, 694 F.2d 130, 142 (7th Cir. 1982)) (emphasis added).

Other decisions cited by petitioner suggest that, in order to hold a *secondary actor* liable under Rule 10b-5(b), a plaintiff must show that the misstatement at issue was publicly attributable to that actor. See *Ziemba* v. *Cascade Int'l, Inc.*, 256 F.3d 1194, 1206 (11th Cir. 2001); *Wright* v. *Ernst & Young LLP*, 152 F.3d 169, 175 (2d Cir. 1998), cert. denied, 525 U.S. 1104 (1999). Even assuming, however, that such a requirement would apply where the defendant is a corporate executive (rather than a secondary actor), it would be inapposite here, because those decisions derived their attribution requirement from the reliance element of a private cause of action under Section 10(b) and Rule 10b-5, see *Ziemba*, 256 F.3d at 1206; *Wright*, 152 F.3d at 175—an element that need not be proven in an enforcement action by the SEC. See, *e.g.*, *SEC* v. *Rana Research, Inc.*, 8 F.3d 1358, 1362 (9th Cir. 1993); *Schellenbach* v. *SEC*, 989 F.2d 907, 913 (7th Cir. 1993); *SEC* v. *Blavin*, 760 F.2d 706, 711 (6th Cir. 1985). Accordingly, no court of appeals has held that the SEC must prove that a misstatement was publicly attributable to a secondary actor in order to hold that actor liable in an enforcement action—much less that the SEC must make a similar showing where, as here, the defendant is a corporate executive. Cf. *SEC* v. *KPMG LLP*, 412 F. Supp. 2d 349, 372-375 (S.D.N.Y. 2006) (rejecting attribution requirement in SEC enforcement action); but cf. *SEC* v. *Lucent*

*Techs., Inc.*, 363 F. Supp. 2d 708, 724 (D.N.J. 2005) (imposing attribution requirement).[4]

b. Petitioner suggests (Pet. 14-17) that the Court should grant review in this case because it would "assist" in the disposition of *Stoneridge Investment Partners, LLC* v. *Scientific-Atlanta, Inc.*, cert. granted, No. 06-43 (Mar. 26, 2007). As petitioner seemingly recognizes (Pet. 9), however, *Stoneridge* presents the conceptually distinct question whether (and, if so, under what circumstances) a secondary actor can be liable not for making misstatements under Rule 10b-5(b), but rather for engaging in allegedly "deceptive" *conduct* under Rule 10b-5(a) or (c) (on the theory that the secondary actor entered into a deceptive transaction with an issuer and the issuer subsequently made misstatements concerning that transaction on which investors ultimately relied). Resolution of the question presented here will have no bearing on the resolution of the question presented in *Stoneridge*, because this case involves only the circumstances under which a company executive can be liable for misstatements in the company's SEC filings under Rule 10b-5(b). Conversely, because resolution of the question presented in *Stoneridge* will have no effect on the resolution of the question presented here, petitioner does not ask this Court to hold the petition pending the disposition of *Stoneridge*, and

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[4] Petitioner contends (Pet. 12-13) that she cannot be liable because she did not have a duty to disclose. Even assuming that petitioner lacked a duty to disclose, however, that contention is meritless. While it is true that a defendant cannot be held liable for *silence* absent such a duty, see, *e.g.*, *Chiarella* v. *United States*, 445 U.S. 222, 230 (1980), this case involves affirmative *misstatements* in Akorn's Form 10-K, as both the court of appeals and the Commission recognized. See, *e.g.*, Pet. App. 14a, 42a-45a.

it would be unnecessary for the Court to do so. Because petitioner identifies no valid circuit conflict on the question presented here, further review on that question, whether in conjunction with *Stoneridge* or otherwise, is unwarranted.

2. Petitioner additionally contends (Pet. 17-28) that the court of appeals erred in various other respects by denying her petition for review of the SEC's cease-and-desist order. Petitioner, however, does not assert that the court of appeals' decision conflicts with a decision of this Court or of another court of appeals in any of those respects. Petitioner's miscellaneous claims are largely fact-bound and entirely without merit.

a. Petitioner first asserts (Pet. 19-20) that the Commission deprived her of her rights to notice under the Due Process Clause and Section 21C of the 1934 Act, 15 U.S.C. 78u-3, because the Commission found that she had violated Section 10(b) and Rules 10b-5 and 13b2-2 based on facts that were not alleged in the order instituting proceedings. That assertion is unfounded. With regard to Section 10(b) and Rule 10b-5, petitioner contends (Pet. 19) that, whereas the order instituting proceedings alleged that Akorn's Form 10-K misrepresented the company's net income, the Commission found that the Form 10-K failed to disclose the difficulties that Akorn was having in collecting its outstanding bills. As a preliminary matter, the Commission also found that the Form 10-K misrepresented Akorn's net income, see Pet. App. 42a, and that finding alone would serve as a sufficient basis for sustaining the Commission's ultimate finding of a violation. In any event, the order instituting proceedings did allege that Akorn's Form 10-K failed to disclose the difficulties that Akorn was having in collecting its outstanding bills, and thus provided sufficient

notice of that alternative basis for liability. See *id.* at 72a (alleging that petitioner and another individual failed to "disclose in Akorn's 2000 Form 10-K any impairment of [Akorn's] receivables").

With regard to Rule 13b2-2, petitioner contends (Pet. 19) that, whereas the order instituting proceedings alleged that petitioner made misrepresentations to Akorn's auditor by making certain statements in the April 17 letters, the Commission found that petitioner made misrepresentations by making other statements in the letters (and earlier oral statements to the auditor). The order instituting proceedings, however, alleged that petitioner signed the April 17 letters "knowing [them] to be false," Pet. App. 72a, and further alleged that petitioner "did not tell the auditors about the true condition of Akorn's accounts receivable," notwithstanding her knowledge of the substantial discrepancy in the amount owed by Cardinal, Akorn's largest customer. *Id.* at 73a. Those broad allegations fairly encompass the specific misrepresentations on which the Commission ultimately relied. See 17 C.F.R. 201.200(b)(3) (providing that the order instituting proceedings "shall set forth the factual and legal basis alleged in such detail as will permit a specific response thereto").

b. Petitioner argues (Pet. 20-22) that the court of appeals erred by affirming her liability under Rule 13b2-1, which provides that "[n]o person shall directly or indirectly, falsify or cause to be falsified, any book, record, or account subject to section 13(b)(2)(A) of the [1934] Act. " 17 C.F.R. 240.13b2-1. Petitioner specifically contends (Pet. 20) that the order instituting proceedings and the Commission's opinion failed to identify a specific book, record, or account that was deliberately falsified. As the Commission explained, however, Rule

13b2-1 contains no scienter requirement (and thus does not require the intent to falsify a particular book, record, or account), Pet. App. 51a & n.42 (citing *SEC* v. *McNulty*, 137 F.3d 732, 741 (2d Cir.), cert. denied, 525 U.S. 931 (1998)), and "[petitioner's] failure to implement a system of internal controls to ensure that transactions were properly recorded" at a minimum rendered Akorn's financial statements inaccurate. *Id.* at 52a n.43.

c. Petitioner similarly contends (Pet. 22-23) that the court of appeals erred by affirming her liability under Rule 13b2-2, which provides in relevant part that "[n]o director or officer of an issuer shall, directly or indirectly[,] [m]ake or cause to be made a materially false or misleading statement to an accountant in connection with" an audit of financial statements or reports filed with the SEC. 17 C.F.R. 240.13b2-2. Petitioner first asserts (Pet. 22) that the relevant statements, in the April 17 letters to Akorn's auditors, were statements that she subjectively believed were correct and thus could not subject her to liability under Rule 13b2-2. Like Rule 13b2-1, however, Rule 13b2-2 does not contain a scienter requirement, see *McNulty*, 137 F.3d at 740-741, and the Commission in any event concluded that petitioner either actually knew or was reckless in not knowing that the statements in the letters were false or misleading. Pet. App. 45a-46a, 57a. Thus, to the extent that the letters "were expressly couched as statements of [petitioner's] subjective beliefs" (Pet. 22), the substantive statements in the letters could still be false or misleading; were it otherwise, a director or officer could evade liability through the simple expedient of including boilerplate language in any submission to an auditor. Petitioner also asserts (Pet. 22-23) that she was no longer an officer at the time she signed the letters to

Akorn's auditor. The Commission, however, expressly found that petitioner was employed as Akorn's "corporate controller" after her demotion, see Pet. App. 26a, 57a, and the record contained an Akorn press release announcing her appointment to that position, see C.A. App. 443.

d. Petitioner next argues (Pet. 24-25) that the SEC lacked jurisdiction to enter a cease-and-desist order against her, at least with regard to the allegations that she caused Akorn to violate the securities laws, without also joining Akorn in the order. Petitioner cites no authority for that proposition, however, and the language of the relevant statutory provision does not support it. Section 21C of the 1934 Act authorizes the SEC to "enter an order requiring [a] person [who has violated or is about to violate the 1934 Act or a rule thereunder], and any other person that is, was, or would be a cause of the violation, * * * to cease and desist from committing or causing a violation." 15 U.S.C. 78u-3(a). As the Commission concluded, that language merely authorizes the SEC to proceed not only against a violator, but also against a person who causes a violation; it does not require the SEC to enter a cease-and-desist order against both or neither. See Pet. App. 66a n.69. A contrary reading would render it difficult for the SEC to settle with a single party in a multiparty proceeding, insofar as it would seemingly preclude the SEC from obtaining a cease-and-desist order against the remaining parties. And such a reading would be particularly inequitable here, because the SEC instituted separate proceedings against Akorn (and ultimately obtained a consensual cease-and-desist order). See *Akorn Inc.*, Exchange Act Release No. 48,546, 81 SEC Docket 330 (Sept. 25, 2003).

e. Finally, petitioner contends (Pet. 25-28) that the court of appeals substituted its own reasoning for the Commission's in denying review of the Commission's finding that petitioner violated Section 13(b)(5) of the 1934 Act, which provides that "[n]o person shall knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record or account described in paragraph (2)." 15 U.S.C. 78m(b)(5). The Commission concluded that petitioner violated Section 13(b)(5) because she "knew that Akron did not have a system of internal accounting controls for its accounts receivable necessary for the preparation of accurate financial statements and knowingly failed to implement such system." Pet. App. 51a-52a. The Commission therefore did not hold, as petitioner suggests (Pet. 28), that any system of internal controls must "meet[] the standard prescribed by § 13(b)(2)." The court of appeals, in turn, concluded that "there is substantial evidence that [petitioner] failed to implement and maintain internal accounting controls at Akorn in violation of Section 13(b)(5)." *Id.* at 21a. Insofar as the court of appeals cited a statement on auditing standards, it did not suggest that any system of internal controls must meet some standard prescribed by that statement; instead, it merely recognized that the SEC had itself cited that statement in providing examples of the types of internal controls covered by Section 13(b)(5). See *id* at 20a n.19. The court of appeals' reasoning in upholding the Commission's finding of liability under Section 13(b)(5) was therefore entirely consistent with the Commission's.

## CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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